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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, ex rel. DOMINICK DAVERSE, Petitioner,

v.

WILLIAM HOHN, Warden of Westmoreland County Jail.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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WILLIAM HOHN, Warden of Westmoreland County Jail.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Dominick Daverse, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled cause on September 17, 1952, affirming the judgment of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

1. The opinion of the United States District Court for the Western District of Pennsylvania dismissing Petition for Writ of Habeas Corpus is reported at 101 F. Supp. 17. The opinion of the United States Court of Appeals for the Third Circuit (R. ...) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered on September 17, 1952 (R. ....). The jurisdiction of this Court is invoked under Title 28 U.S.C. sec. 1257(3).

QUESTIONS PRESENTED

Was Petitioner deprived of a fair and impartial trial in violation of the due process clause of the Fourteenth Amendment where:

(a) The jury which found him guilty of murder in the first degree and fixed the penalty at death included as a member thereof a juror shown to have made assertions that: he was in possession of the murder weapon which was not introduced at the trial; that he hated Italians and that during his service as a peace officer he had killed two of them with a blackjack and seriously injured another; that he had known the accused before trial and that he was "no good", was a Communist, a "blackhand", and "a killer, like all Italians"; that the Italians had tried to burn the courthouse during the trial and that the sheriff had to escort all the jurors, except him, home; that he knew from the start the accused was guilty of the murder and that he had made his decision before the trial and it still stood;—and where

(b) Through the coercion, and under authority, of an order of court procured by the District Attorney over objection of Petitioner, Petitioner was compelled, prior to trial, to undergo two so-called "psychiatric examinations" and to answer questions with respect to his commission of the crime, his motives therefor, and his possible defenses;—and where

(c) The trial judge, in the absence of the accused, forwarded a communication to the jury in reply to an inquiry made by that body during the course of its deliberations.

STATUTE INVOLVED

Constitution of the United States, Amendment XIV:

"Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, Dominick Daverse, was indicted for the murder of his wife, Theresa Daverse, in the Court of Oyer and Terminer of Westmoreland County, Pennsylvania, at the May Term, 1947, and upon entering a plea of "Not Guilty" was tried before the Honorable Richard Laird. A verdict of "guilty of first degree; death" was returned by the jury.

Upon appeal to the Supreme Court of Pennsylvania, the conviction and judgment of sentence were affirmed (364 Pa. 623, 73 A. 2d 405) and Petition for New Trial in the same court was refused. Petition to that court for Writ of *Habeas Corpus* was denied and this Court denied Petition for Writ of Certiorari to review the said denial: *Pa. ex rel. Daverse v. Hohn, Warden et al.*, 342 U. S. 812. Thereupon, Petitioner, having exhausted his state remedies in accordance with *Darr v. Burford*, 339 U. S. 210, filed Petition for Writ of *Habeas Corpus* in the United States District Court for the Western District of Pennsylvania.

The Petition for Writ of *Habeas Corpus* alleged that Petitioner had been deprived of a fair and impartial trial in violation of the due process clause of the Fourteenth Amendment in that a member of the jury which had found him guilty of murder in the first degree and had fixed the penalty therefor at death, entertained a violent antipathy toward Italians (R. 6a) and had asserted that: during his service as a peace officer he had killed two of them (Italians) with a blackjack and seriously injured another; that he had known the accused before trial and that he was "no good", was a "Communist", a "Blackhand", and a "killer, like all Italians"; that the Italians had tried to burn the courthouse during the trial and the sheriff had to escort all the jurors, except him, home (R. 7a, 25a).

The Petition also alleged violation of the due process clause of the Fourteenth Amendment in that through the coercion, and under the authority, of an order of court procured by the District Attorney over the objection of Petitioner, Petitioner was compelled, prior to trial, to submit to two so-called "psychiatric examinations" during which he was required to answer questions with respect to his commission of the crime, his motives therefor, and possible defenses (R. 12a-15a).

Petitioner further alleged that in violation of the due process clause of the Fourteenth Amendment, the trial judge, in the absence of the accused, forwarded a communication to the jury in reply to an inquiry made by that body during the course of its deliberations (R. 7a-10a).

The District Court directed a hearing upon the said Petition for Writ of *Habeas Corpus*, but limited such

hearing solely to the question of the alleged bias and prejudice of the juror, James Bridge (R. 38a). It refused to hear any evidence with respect to the juror's assertion that he was in possession of the murder weapon, a .22 caliber gun, which had never been introduced at Petitioner's trial (R. 77a, 78a, 107a-110a, 114a), and refused Petitioner permission to introduce into evidence and to have tests made (R. 88a, 108a-111a, 172a) of the .22 caliber gun which the juror, James Bridge, had with him at the hearing on the Petition and which he produced on cross-examination (R. 77a-79a).

The District Court by its order (R. 38a) limiting the hearing to the issue of the juror's bias and prejudice, denied Petitioner an opportunity to present evidence as to the communications between judge and jury made in the absence of the accused, and as to the two pre-trial psychiatric examinations ordered by the court, during which examinations Petitioner was compelled to answer interrogatories and to give information relative to his commission of the crime, his motives and possible defenses.

After the hearing, limited, as before stated, to the issue of the juror's bias and prejudice, the court below held that Petitioner had failed to prove such bias or prejudice and dismissed the Petition (R. 130a, 131a). The United States Court of Appeals for the Third Circuit filed an opinion (R. ....) approving the action of the District Court and entered its judgment of affirmance accordingly (R. ....). Petitioner now seeks a review of that judgment.

SPECIFICATIONS OF ERROR TO BE URGED

The Court of Appeals erred:

(1) In holding that the hearing on the Petition had been properly limited to the single issue of the alleged bias and prejudice of the juror, James Bridge.

(2) In failing to hold the District Court erred in refusing to hear evidence as to the statements made by the juror, James Bridge, that he was in possession of the murder weapon (a .22 caliber gun) which had not been introduced at the trial of the Petitioner.

(3) In failing to hold the District Court erred in refusing to admit into evidence, and in refusing to permit tests of, the .22 caliber gun which the juror, James Bridge, carried with him at the time of the hearing before said District Court on the Petition for Writ of *Habeas Corpus*, and which he produced upon cross-examination.

(4) In failing to hold the District Court erred in excluding the testimony of the juror's daughter and former wife relative to the qualities of the said juror which rendered him unfit to act as juror.

(5) In failing to hold that the finding of the District Court that the juror, James Bridge, was not biased or prejudiced was clearly erroneous.

(6) In failing to hold the District Court erred in excluding all testimony relative to the communications between judge and jury made in the absence of the accused.

(7) In failing to hold the District Court erred in excluding all testimony relative to the pre-trial pay-

chiatric examinations made, over objections of Petitioner, pursuant to an order of court requested by the District Attorney, during which examinations Petitioner was compelled to give information as to his commission of the crime, his motives therefor, and his possible defenses.

(8) In failing to hold that coerced pre-trial psychiatric examinations of the accused made, over the objection of Petitioner, pursuant to an order of court requested by the District Attorney, during which examinations Petitioner was compelled to give information as to his commission of the crime, his motives and possible defenses, did not violate the rights of the accused under the due process clause of the Fourteenth Amendment.

(9) In failing to hold that the trial of the Petitioner was so lacking in fundamental fairness that it constituted a deprivation of his life and liberty without due process of law in violation of the Fourteenth Amendment.

REASON FOR GRANTING THE WRIT

The Court of Appeals for the Third Circuit, in deciding that there was no deprivation of due process and thus no violation of the Fourteenth Amendment of the United States, has decided a federal question of substance in a way not in accord with the applicable decisions of this Honorable Court, as more fully hereinafter set forth.

ARGUMENT

I. The Bias and Prejudice of the Juror, James Bridge, Caused Petitioner to Be Deprived of His Life and Liberty by a Trial That Was Not Fair and Impartial But Which Was Lacking in Fundamental Fairness and Justice, in Violation of the Fourteenth Amendment.

At the hearing on the Petition for Writ of *Habeas Corpus*, limited to the issue of the juror's bias and prejudice, J. Hollis McGuire was called as a witness for Petitioner. In corroboration and in confirmation of his affidavit (R. 25a) he testified on direct examination that Petitioner had employed him to determine whether the jurors who had tried him had any recommendation with respect to his appeal to the Board of Pardons of the Commonwealth of Pennsylvania for commutation of sentence (R. 91a-92a). Mr. McGuire testified that pursuant to that request he called upon the juror, James Bridge, at his home on March 16, 1951, and that said juror at that time made the statements incorporated in Mr. McGuire's affidavit (R. 26a-27a) to the effect that he, James Bridge, hated Italians; that he had killed two of them with a blackjack and had seriously injured another; that he knew the accused before the trial and that he was "no good", was a "Communist", a "blackhand", and "a killer, like all Italians"; that the Italians had tried to burn the courthouse during the trial and the sheriff had to escort all the jurors, except him, home; that he knew from the start the accused was guilty of the murder and that he had made his decision before the trial was over and that it still stood.

Mr. McGuire, upon his examination at the hearing, re-affirmed the contents of his affidavit (R. 93a-98a).

Though James Bridge denied the allegations of the affidavit, he did admit that he knew J. Hollis McGuire and that Mr. McGuire in the spring of 1951 visited him at his cabin in the mountains (R. 53a). He admitted having spoken to Mr. McGuire and that he had told Mr. McGuire he had at one time arrested three Italians. He further admitted that he had had a fight with the three Italians and under questioning said that he did not use a blackjack but the butt of his gun in the course of making the arrest (R. 57a-58a). He admitted having shown scars on the back of his neck to Mr. McGuire and having told him that he had received these wounds during the arrest of the three Italians (R. 56a). The juror further admitted that he also showed Mr. McGuire a scar on his leg where a colored fellow had shot him (R. 59a). Mr. Bridge further admitted that he had quarrels with Italians and called them "dagoes" and "wops", but explained that if he did, he had a pretty good "brannigan" on and didn't know what he was doing (R. 68a).

Proof of this juror's prejudice and bias was also offered by numerous other witnesses. Dominick Joe, an American of Italian descent, testified he knew the juror, James P. Bridge for some 26 years and on numerous occasions the juror had called him a "dago" and a "guinea" (R. 129a-130a).

Mr. Frank Ferma testified that he was a bartender in Blairsville; that on various occasions the juror, James Bridge, came into his bar "lit"; that on these occasions he had refused to serve James Bridge, and that Mr. Bridge would respond, "Well, go to hell, you dago" (R. 132a).

Mr. Albert Fulvio testified he has known James P. Bridge for 18 or 20 years, and that he heard the juror oftentimes call Americans of Italian descent "dagoes" and "wops" and that usually a swear word was used with the expression. The witness further testified that this occurred very frequently and more often than not when the juror was sober (R. 134a-135a).

Mr. John Rich testified he had lived in New Derry for some 44 years and had been acquainted with James Bridge, the juror, as long as he could remember. This witness testified he had heard Mr. Bridge call American citizens of Italian descent "dagoes" and "wops" on numerous occasions, and that the juror also cursed them (R. 136a).

Mr. Clarence Johns testified he had known James Bridge for a great number of years and that on any number of occasions he had heard the juror call Americans of Italian descent "guinea", "dago", "wop", and "bohunks" (R. 139a).

Mr. Fred John testified he knew the juror, James Bridge, since 1917 and that Mr. Bridge frequently used the expressions, "dago", "guinea" and "hunkey" when referring to American citizens of Italian descent (R. 141a).

Mr. Carl Bosio testified he knew the juror James Bridge for a period of some seven or eight years; that Mr. Bridge came in his place one time when he was pretty "high" and Mr. Bosio refused to serve him, and that Bridge then stated, "if he was the boss, if he ran the country, he would send all the 'dagoes' back to the old country (R. 145a-146a).

The overwhelming mass of evidence thus presented at the hearing clearly established the prejudice of the juror James Bridge against the accused. It indicates a deep-rooted and settled prejudice which would make him incapable of rendering a fair and impartial judgment in his deliberations as juror. All this evidence stands uncontradicted except for the general denial of the juror himself, but it is to be noted that the evidence is also monumental in demonstrating the juror's bad reputation as to truth and veracity. An examination of the testimony adduced at the hearing reveals that his reputation was bad not in one community but in several communities.

Mr. John Larkin, Chief of Police since January of 1947, testified that he knew James Bridge; that he knew other people that knew him, and that the reputation of said James Bridge, in the community for truth and veracity was bad (R. 123a).

Mr. J. M. Turner, of Blairsville, engaged in the insurance real estate business, a member of borough council and president of the board of councilmen, testified he knew James Bridge since 1937 and knew other people in the community who knew the juror; that he was familiar with the juror's reputation in that community for telling the truth and for veracity and that it was bad (R. 124a-125a).

Mr. Dominick Joe testified he lived in New Derry, Pennsylvania; that he knew the juror, James Bridge; that the whole town of New Derry knew Mr. Bridge; that he was familiar with Bridge's reputation in the community for telling the truth and that it was bad (R. 130a).

Mr. Frank Perna testified he lived in Cokeville, Pennsylvania; that he knew James Bridge for many years and that the juror's reputation in the community for telling the truth wasn't too good (R. 133a).

Mr. Albert Fulvio testified that he lived in Derry, Pennsylvania; that he knew James Bridge for eighteen or twenty years; that nearly the whole town knew Bridge and that the reputation of Bridge in the community for telling the truth was not very good (R. 134a). Upon cross-examination, Mr. Fulvio was asked, "Have you heard people discuss the reputation of Bridge as to whether it was good or bad?" He answered, "Oh yes, I have never heard anybody say anything good about him." (R. 135a).

Mr. John Rich testified that he lived in New Derry, Pennsylvania for some 44 years and had known Bridge all his life; that he was familiar with the reputation of Bridge in the community for telling the truth. He stated that James Bridge "don't tell the truth often" (R. 137a).

Mr. Clarence John testified he lived in New Derry, Pa. for thirty years; that he knew Bridge for a great number of years; that he was familiar with the reputation of Bridge for telling the truth and that his reputation was not so good (R. 139a).

Mr. Fred Johns testified he lived in New Derry, Pa., had known Bridge since 1917; was familiar with the reputation of Bridge in the community and that it was not so good (R. 141a).

Mr. Charles Linza, a merchant, testified he lived in Latrobe, Pa.; that he knew Bridge, was familiar with his reputation for telling the truth and that it was bad (R. 143a).

Petitioner was entitled to be tried by a fair and impartial jury, and the failure of the Commonwealth of Pennsylvania to accord him that right was a deprivation of his life and liberty without due process of law, in violation of the Fourteenth Amendment of the United States Constitution.

In *Adamson v. California*, 332 U. S. 46, your Honorable Court held:

> "A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment. * * *"

And in the recent case of *Rochin v. People of California*, 72 S. Ct. 205 (1952), your Honorable Court held that "prosecutions cannot be brought about by methods that offend a sense of justice".

It does "offend a sense of justice" that a man with the bias and prejudice of James Bridge sat in judgment upon the defendant and participated in the deliberations which resulted in a verdict of murder in the first degree with penalty fixed at death. The accused was denied his constitutional right to be tried by a fair and impartial jury and was convicted by a trial lacking in fundamental fairness and justice.

In *Chambers v. State of Florida*, 309 U.S. 227, in discussing the historical background of the due process clause, the Supreme Court of the United States said:

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. * * * From the popular hatred and abhorrence of the illegal confinement, evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal puniah-

ment for violation of that law until there had been a charge fairly made and *fairly tried* in a public tribunal *free of prejudice, passion, excitement and tyrannical power.*" (Emphasis supplied).

Those principles, however, were not adhered to in the Petitioner's case.

II. Testimony of Juror's Daughter and Former Wife as to Those Qualities of Juror Which Rendered Him Unfit to Serve on Jury Was Relevant and Material to Issue of Whether the Bias and Prejudice of That Juror Caused Petitioner to Be Deprived of His Life and Liberty by a Trial Not Fair and Impartial But Lacking in Fundamental Fairness and Justice, in Violation of Fourteenth Amendment. The Exclusion of Such Evidence Was Clearly Prejudicial Error.

Petitioner offered (R. 174a-176a) the testimony of Maude Witherow Bridge, former wife of the juror, James Bridge, for the purpose of showing that "James P. Bridge, her former husband, was a chronic liar; that he is dishonest, unreliable, untrustworthy, opinionated, domineering, unpredictable, and generally unfit to serve as a juror or in any capacity where the qualities of a juror are essential." (Emphasis supplied) The District Court, however, refused to permit the testimony.

It is Petitioner's contention that such evidence—which, as noted from the offer above-quoted, related to a period sufficiently recent to include the time of Petitioner's trial—was clearly admissible on the issue of the juror's bias and prejudice and unfitness to serve as juror. Such testimony would have shown that this juror was

not qualified to sit in judgment upon the accused, and that his participation in the deliberations as to the accused's guilt and penalty resulted in Petitioner being deprived of his life and liberty by a trial which was not fair and impartial and which was contrary to the fundamental principles of justice and fairness. Since the excluded evidence thus had a very direct bearing on the issue of whether Petitioner was accorded the protection of a fair and impartial trial as guaranteed by the due process clause of the Fourteenth Amendment, the District Court's rejection of this testimony constituted an unreasonable refusal to inquire to the very issue to be decided and was clearly prejudicial error.

III. Juror's Assertions That He Possessed Murder Weapon (.22 Caliber Gun) Was Material and Relevant to Issue of Whether the Bias and Prejudice of That Juror Caused Petitioner to Be Deprived of Life and Liberty by a Trial Not Fair and Impartial But Lacking in Fundamental Fairness and Justice, in Violation of Fourteenth Amendment. The Exclusion of Such Evidence and Court's Refusal to Permit Tests of .22 Caliber Gun Produced by Juror at Hearing Was Clearly Prejudicial Error.

The District Court in granting the hearing on the issue of the bias and prejudice of James Bridge directed that subpoena issue against the said juror but did not address that direction to Petitioner (R. 38a). In order to ascertain, therefore, whether the juror had already been subpoenaed or whether it would be necessary for Petitioner to subpoena him, one Fred Andrews was asked, in behalf of Petitioner, to call upon the juror. He determined that Mr. Bridge had already been subpoenaed (R. 112a).

Accordingly, on the day set for hearing, the juror, James Bridge, appeared in court and took the stand. Then, to the astonishment of all present, he produced, under cross-examination a .22 caliber gun (R. 77a). Petitioner offered to show that on an occasion this juror had produced a .22 caliber gun in his home and had stated at that time, "This is the gun that killed that woman (meaning the victim in the Daverse shooting) (R. 107a-111a). The District Court, however, refused to hear this evidence and refused (R. 107a-111a) to permit the introduction into evidence, and the conduct of tests, of the .22 caliber gun which the juror, James Bridge, actually produced (R. 88a) at the hearing which was limited to the very issue of his bias and prejudice. Such refusal constituted prejudicial error.

Since the gun used in killing Theresa Daverse had not been produced at Petitioner's trial, full inquiry and investigation into the juror's assertions should have been permitted. If this was in fact the murder weapon which he possessed, when, how and why this juror received it would obviously be relevant to the issue: Did Petitioner receive a fair and impartial trial in accordance with fundamental principles of justice and fairness? If this juror actually possessed the murder weapon at the time of trial, such fact would have a material bearing on his bias and prejudice. If he received the murder weapon after the trial, then if it could be shown that this juror received a reward for his services in property of any type or description, then the jury's verdict should not stand.

Furthermore, even if the gun possessed by the juror was not in fact the murder weapon, if this juror believed that it was,—or even if he did not believe that it was,

but displayed it to the other jurors and stated to them that it was the murder weapon—it would not require much effort to imagine the damaging effect thereof. Petitioner's trial would under those circumstances have been a sham and a mockery. Yet, he was prevented from ascertaining the true facts of this very serious and grave matter. The District Court's action in this matter was clearly erroneous and prejudicial, and the Circuit Court should so have held. The guaranties of a fair trial are meaningless if courts are permitted at the threshhold to prevent investigation into such an important matter.

IV. Coerced Psychiatric Examinations, During Which Accused Was Compelled to Give Information as to His Commission of the Crime, His Motives and Defenses, Are Not in Conformity With the Fundamental Principles of Justice and Fairness and Are a Violation of the Due Process Clause of the Fourteenth Amendment. The Exclusion of Evidence Thereof Was Clearly Prejudicial Error.

Petitioner alleged in his Petition for *Habeas Corpus* that while he was in jail awaiting trial, he was compelled by order of court, entered over his objections, to undergo psychiatric examinations and to make oral statements of a self-incriminating nature, in violation of his rights under Fourteenth Amendment (12a-15a). The facts in support of that allegation are as follows:

After Petitioner was committed to Westmoreland County Jail to await trial, his counsel received a letter from the District Attorney of that County on January 5, 1949, stating that a psychiatrist was to examine the defendant in behalf of the Commonwealth on January 10, 1949 (R. 30a). Petitioner's counsel thereupon re-

plied orally that he would not consent to the proposed examination and that he would object thereto. The District Attorney, however, on January 10, 1949, secured an order of court compelling and coercing the accused to undergo an examination by two psychiatrists selected by the District Attorney. The order was made over the objection of Petitioner's counsel that such a matter should not be heard, decided or ordered in the absence of Petitioner, and that such action would constitute a violation of his rights under the Constitution.

On the same day the order was made, January 10, 1949, two psychiatrists proceeded to the jail and subjected Petitioner to an examination which included an oral examination with respect to Petitioner's commission of the crime, his motives therefor and his possible defenses (R. 32a-37a). The following is an illustration of the interrogation:

"Q. What are you here for?
A. Murder.
Q. Of your wife?
A. Yes.
Q. Did you kill her?
A. I guess I did.
Q. Were you justified?
A. I didn't think one way or the other at the time." (R. 32a-37a).

On January 24, 1949, the District Attorney directed another examination under the authority of the original order of court and further interrogation was made of Petitioner (R. 31a).

At the conclusion of the examinations, the psychiatrists made known their findings to the District Attorney but not to Petitioner or to Petitioner's counsel.

No evidence as to these coerced pre-trial "psychiatric" examinations of the accused was permitted by the District Court, it having limited the hearing to the sole issue of the juror's bias and prejudice (R. 38a). Such exclusion was clearly erroneous for this evidence had a very direct bearing on the issue of whether the proceedings against the accused were in conformity with the fundamental principles of justice and fairness.

In *Commonwealth v. Musto*, 348 Pa. 300, 35 A. 2d 307, the Supreme Court of Pennsylvania made the following distinctions between examinations which offend the constitutional immunity against self-incrimination and those which do not!

> "Realizing that an attempt would be made to prove defendant insane at the time of the murder, the district attorney obtained permission from the court to have alienists examine him in prison. His counsel found fault with this proceeding on the ground that it constituted a violation of defendant's constitutional right not to be compelled to give evidence against himself. While the exact question thus presented has apparently not been ruled upon by either of our appellate courts, it has arisen in many other jurisdictions, and these have quite uniformly held that the constitutional immunity from self-incrimination does not apply to a compulsory examination to determine the prisoner's physical or mental condition for the purpose of testifying in regard thereto, *provided, of course, that he is not compelled to answer any questions propounded to him by those making the examination.* The purpose of the constitutional provision is to prohibit the compulsory oral examination of the prisoner either

before or at trial,—to prevent his being required to incriminate himself by speech or the equivalent of speech. Commonwealth v. Valeroso, 273 Pa. 213, 219, 220, 116 A. 828, 830. 'The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.' Per Mr. Justice Holmes in Holt v. United States, 218 U.S. 245, 252, 253, 31 S. Ct. 2, 6, 54 L. Ed. 1021, 20 Ann. Cas. 1138. 'Not compulsion alone is the component idea of the privilege, but testimonial compulsion. * * * Unless some attempt is made to secure a communication, written or oral, upon which reliance is to be placed as influencing his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one.' 8 Wigmore on Evidence, 3d Ed., 375, sec. 2265. As defendant in the present instance refused to converse with the alienists, but merely kept repeating to them that he wanted to see his counsel, the result was that no worthwhile examination could be made or testified to at the trial, so that the question raised as to defendant's rights under such circumstances is largely theoretical."

The Circuit Court, however, agreed with the District Court's holding (R. 180a) and held in the instant case that "even if the examination could be proved to be violative of the relator's privilege against self-incrimination under the Pennsylvania Constitution, this action by the Commonwealth could not stand as a basis for the argument that the relator was deprived of rights under

the Fourteenth Amendment under the circumstances at bar. See *Adamson v. California*, 332 U.S. 46; *Twining v. New Jersey*, 211 U.S. 78, where state statutes had deprived the defendants of the privilege against self-incrimination. The obliteration from the hearing of the third point raised by Daverse was clearly warranted by the law." (R. ....)

In *Adamson v. California, supra*, so heavily relied on by the Circuit Court for its proposition that protection against self-incrimination is not a privilege or immunity of national citizenship, it is stated:

> "The due process clause forbids compulsion to testify by fear of hurt, torture or exhaustion. *It forbids any other type of coercion that falls within the scope of due process.*"

It therefore follows that even under the decision of the Adamson case, protection against self-incrimination will be afforded under the due process clause of the Fourteenth Amendment where the incriminating statements are elicited through compulsion or coercion of a "type that falls within the scope of due process."

The issue remaining therefore is: "What type of coercion falls within the scope of due process"? Your Honorable Court recently set forth the following answer to that question in *Rochin v. People of California*, 72 Sup. Ct. 205 (1952):

> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. * * * Due process of law as a historic and generative principle precludes defining and thereby confining these standards of conduct more precisely than to say that

prosecutions cannot be brought about by methods that 'offend a sense of justice'."

In the instant case, the coercion was effected by mandate of court, a most effective means of compulsion. It is difficult to believe that an accused must provoke threats of physical hurt or torture before he will be granted any protection under the Fourteenth Amendment. It is most respectfully urged that the threat of punishment for disobedience which lies implicit in the order of court itself is sufficient coercion, under the facts of this case, to "offend a sense of justice".

Petitioner did not have the benefit of counsel during the examinations. He had only a grade school education and no concept of his constitutional privileges. He was cognizant, however, that the court had *directed* him to undergo the examinations. During the course of those examinations Petitioner was forced to give a complete statement of all the facts leading up to the killing for which he was convicted, covering a period beginning with the time he was sixteen years of age (32a-37a). Thus, the District Attorney had, in advance of trial, elicited from the accused under compulsion and coercion information as to the accused's commission of the crime, his motives therefor and his possible defenses. The result was that the Commonwealth was prepared to pursue a very effective course of prosecution while accused's counsel was handicapped and frustrated in his attempt to defend the accused because he had no means of knowing what statements had been made by the defendant during the course of the so-called "psychiatric examinations" conducted in the absence of counsel and did not know the findings of the psychiatrists. For example, one of the psychiatrists, John I. Wiseman, M.D., was pro-

duced at the trial as a witness by the Commonwealth in the presence of the jury, and upon objection of Petitioner's counsel, he was withdrawn without giving testimony. The jury however, was able to observe that the Commonwealth was prepared to proceed with testimony from a psychiatrist, but that it was deprived of the benefit of that testimony by the action of Petitioner's counsel, who was in a position where he was compelled to object, not knowing the contents of the psychiatrist's report.

In *Foster v. State of Illinois*, 332 U.S. 134, your Honorable Court held:

> "The due process of law which the Fourteenth Amendment exacts from the States is a conception of fundamental justice. * * *"

In *Buchalter v. People of State of New York*, 319 U.S. 427, your Honorable Court held that the due process clause of the Fourteenth Amendment requires that action by the state must be consistent with fundamental principles of liberty and justice.

Petitioner, therefore, respectfully urges that it is contrary to the fundamental principles of justice and fairness to compel him, under the threat of punishment for disobedience which lies implicit in every court order, to undergo pre-trial psychiatric examinations and to give information assuring his conviction and sentence.

V. Communications Between Judge and Jury During Deliberations, Made in the Absence of the Accused and Without the Preservation of Stenographic Record Thereof, Are Contrary to the Concept of Fundamental Justice and Fairness Guaranteed by the Due Process Clause of Fourteenth Amendment. The Exclusion of Evidence Thereof Was Clearly Prejudicial Error.

Petitioner also alleged in his Petition for Writ of *Habeas Corpus* that after the jury had retired for deliberation in his case and had been deliberating for several hours, the jury transmitted to the trial judge a written note through a person whose identity is at present unknown to Petitioner (R. 7a-12a). The trial judge did not make known to Petitioner the contents of the note, nor did he take any action thereon in open court. Instead, he summoned counsel for the Commonwealth and Petitioner's counsel to his chambers and after discussions between the said counsel and the court, but in the absence of Petitioner, a written communication was transmitted from the judge's chambers to the jury room. The exact contents of that communication and the identity of the person delivering the same to the jury are unknown to the Petitioner, there having been no stenographic record made thereof. Petitioner does not know whether any verbal messages or instructions accompanied the written ones. He only knows that shortly after the judge's message to the jury, the jury returned a verdict of "guilty of first degree; death". During the entire time in which the above occurrences were taking place in chambers, Petitioner was in his cell unaware that anything was taking place that might affect his life (R. 7a-10a).

The Petitioner was not permitted by the District Court to give testimony in support of these allegations of communications between judge and jury in his absence, even though a stipulation (28a-29a) between counsel for Commonwealth of Pennsylvania and counsel for Petitioner admits that the incidents referred to occurred.

In the Stipulation above referred to, it was agreed that the context of the jury's note was "substantially" as follows:

> "If we, the jury, find the defendant guilty of first degree murder with life imprisonment, will he remain in prison the rest of his life or will he have a chance to be released later on?"

and that the trial judge made the following reply:

> "The Court is not permitted to answer the questions you have submitted."

This Stipulation was entered into in September of 1950, more than one and one-half years after the trial, and the reconstruction of the contents of the notes was made wholly from memory without records to refresh the recollection. It is submitted that since Petitioner's life was in balance, the precise wording of the notes and the precise phrasing of the question might, in the subsequent developments, have turned the scales in favor of life imprisonment rather than death.

Even assuming that the question propounded by the jury and answer made thereto by the judge were as they appear in the stipulation, then the judge's reply "This court is not permitted to answer the questions you have submitted" was improper.

In *Commonwealth v. Mills*, 350 Pa. 478, 39 A. 2d 572, the jury sent a communication to the court requesting further instructions, the note reading, "Will you please give us the definition of 'life imprisonment' and the penalty. Is the prisoner eligible for parole at any time?" The court there gave additional instructions to the jury *in the prisoner's presence* to the effect that when a prisoner is sentenced to life imprisonment he is not eligible for parole but that he could apply to the Pardon Board for a commutation of his sentence. The court there further instructed the jury that if such application were made, the Board would then make its recommendations to the Governor, in its discretion, for either a reduction of the sentence or for a full pardon. The Supreme Court of Pennsylvania, on appeal, held that such instructions constituted an implied invitation to the jury to transfer to the Board of Pardons an unpleasant responsibility which it was the jury's sworn duty to discharge, and that whether or not the prisoner was eligible for parole was no concern of the jury and *that the trial judge should have said so.*

Not only did the trial judge in the instant case fail to give the proper instructions but he conveyed his message to the jury in the absence of the accused. Under the Fourteenth Amendment of the United States Constitution an accused has the privilege to be present in person during the prosecution for felony whenever his presence has a reasonably substantial relation to fullness of opportunity to defend against the charge: *Snyder v. Commonwealth of Mass.*, 291 U.S. 97. In the case at bar, the accused was awaiting word as to whether he would live or be sentenced to death and was completely unaware that the jury which would determine that issue had communicated with the judge and that the judge

had given additional instructions in his absence. A guess should not be hazarded as to whether that error was prejudicial to the accused, for "if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal: *Little v. United States*, 73 F.2d 861 (C.C.A. 10); *Ah Fook Chang et al. v. United States*, 91 F. 2d 805 (C.C.A. 9).

> "It is the inherent right of the accused in a capital case to be present at every stage of the proceedings from the arraignment to the rendition of the verdict. Neither court nor judge can take any step affecting his right in his absence:" *Commonwealth v. Corsino*, 261 Pa. 593.

In the Corsino case, the jury retired to consider the case and the indictment could not be found. A copy was ordered filed in place of the original. This order was made by the trial judge in his chambers. The defendant's plea of "not guilty" entered on the original indictment was omitted from the copy; aside from this, they were alike. The Court said that the law so jealously guards the prisoner's rights when on trial for his life that it will not tolerate any false step which might result to his prejudice even when taken inadvertently. It accordingly held that the application to amend the indictment or substitute a copy should have been made in open court *in the presence of defendant* with notice to his counsel. The right of the Court to permit a copy to be filed in place of the original indictment was not the question. The Court stated:

> "It may be that no harm was done defendant; the same might be said of answering questions propounded by jurors, giving them additional instruc-

tions or taking their verdict, and yet no one would urge that such could be done in the absence of defendant."

Despite the fact that the Court in *Commonwealth v. Corsino, supra*, states that no one would urge that the questions of jurors might be answered or additional instructions might be given in the absence of the defendant in a capital case, yet we have this situation in the instant case.

The case of *Arrington et al. v. Robertson*, 114 F. 2d 821 (C.C.A. 3), although dissimilar in some respects from the matter under consideration, in dealing with a related problem, states,

> "The action of the trial judge in the present case in sending instructions to the jury room from his chambers in the absence of the defendant or his counsel and without giving them notice and an opportunity to be present, amounted to a denial of due process of law. We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given. The inquiry of the jury and the trial judge's response were not reported by the court stenographer. The record does not disclose the phraseology of the jury's question. Consequently we cannot know whether the instructions given, even though entirely sound as abstract legal statements, were appropriate to answer it, or whether additional instructions, appropriate and indeed necessary to supplement those given, might not have been suggested to the trial judge by counsel for the defendant if he had been given the opportunity to be present."

In *Ah Fook Chung et al, v. United States, supra*, it was held:

"It is error for the court to instruct or communicate with the jury in the absence of counsel and without notice to them. Fillipoon v. Albion Vein Slate Co., 250 U. S. 7, 39 S. Ct. 435, 63 L. Ed. 853; Shields v. United States, 273 U. S. 583, 47 S. Ct. 478, 71 L. Ed. 787; Philadelphia & R. Ry. Co. v. Skerman (C.C.A. 2), 247 F. 269; Dodge v. United States (C.C.A. 2), 258 F. 300; Outlaw v. United States (C.C.A. 5), 81 F. (2d) 805; Sandusky Cement Co. v. A. R. Hamilton & Co. (C.C.A. 6), 287 F. 609; Peppers v. United States (C.C.A. 6), 37 F. (2d) 346; Little v. United States (C.C.A. 10), 73 F. (2d) 861; 84 A.L.R. 220, Annotation."

"* * * Finally if the record shows error but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal. Little v. United States (C.C.A. 10), supra."

In *Lewis v. United States*, 146 U. S. 370, your Honorable Court held:

"A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner. While this rule has at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. 'It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors

to listen to his defense with indulgence.' Prine v. Com., 18 Pa. St. 103, per Gibson, C. J. And it appears to be well settled that, where the personal presence is necessary in point of law, the record must show the fact. Thus in a Virginia case (Hooker v. Com., 13 Grat. 763) the court observed that the record showed that on two occasions during the trial the prisoner appeared by attorney, and that there was nothing to show that he was personally present in court on either day, and added: 'This is probably the result of mere inadvertence in making up the record, yet this court must look only to the record as it is. * * * It is the right of any one, when prosecuted on a capital or criminal charge, to be confronted with the accusers and witnesses; and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage when anything may be done in the prosecution by which he is to be affected.' Thereupon the judgment was reversed. And in the case of Dunn v. Com., 6 Pa. St. 384, it was held that the record in a capital case must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears. Ball v. U. S., 14 U.S. 118, 11 Sup. Ct. Rep. 761, is to the same effect."

The District Court therefore clearly erred in limiting the hearing solely to the question of the bias and prejudice of the juror and in excluding all evidence as to the communications had between the judge and jury in the absence of the accused.

Conclusion.

Your Honorable Court, in *Rochin v. People of California, supra,* stated:

> "This Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon *the whole course of the proceedings (resulting in a conviction)* in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'"

In view of the (1) the hostility and prejudice of the juror who even claimed he was in possession of the murder weapon, (2) the coerced pre-trial "psychiatric" examinations during which accused was compelled to give evidence against himself; and (3) the communications (of which there is no record) between judge and jury during the latter's deliberations and in the absence of the accused,—Petitioner was deprived of his life and liberty by a trial which was contrary to all concepts of fundamental fairness and justice, in violation of the due process clause of the Fourteenth Amendment.

WHEREFORE, it is respectfully submitted that the Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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